Supreme Court, U.S.
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No. 03-481

In The Supreme Court of the United States

PETROLEO BRASILEIRO, S.A.,

Cross-Petitioner,

v.

STRATA HEIGHTS INTERNATIONAL CORPORATION, STRATA ENERGY RESOURCES CORPORATION and HEIGHTS ENERGY CORPORATION,

Cross-Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

1. Under the commercial activity exception in the Foreign Sovereign Immunities Act, does an American company's financial loss as a result of its unilateral decision to spend money in the United States to try to obtain contracts with a foreign entity constitute a "direct effect" in the United States so as to overcome foreign sovereign immunity?

2. Does the second clause of the commercial activity exception in the Foreign Sovereign Immunities Act require that "an act" be noncommercial such that a plaintiff's pleading only commercial acts is sufficient to satisfy the requirement and overcome foreign sovereign immunity, and what extent of activity is required to satisfy the second clause?

PARTIES TO THE PROCEEDINGS

Cross-Petitioner is Petroleo Brasileiro, S.A. Purportedly, the Republic of Brazil owns 55.71% of the shares of voting capital in Cross-Petitioner.

Cross-Respondents in this case are Strata Heights International Corporation, Strata Energy Resources Corporation and Heights Energy Corporation. Cross-Respondents are not related to any other publicly held or publicly-traded companies.

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TO THE HONORABLE SUPREME COURT OF THE UNITED STATES:

Cross-Respondents Strata Heights International Corporation, Strata Energy Resources Corporation, and Heights Energy Corporation (hereinafter referred to collectively as "Strata") respectfully submit this Brief in Opposition to the Cross-Petitioner Petroleo Brasileiro, S.A.'s ("Petrobras") Conditional Cross-Petition.

I. STATEMENT OF THE CASE

A. Summary of the Argument

This honorable Court should deny Petrobras' Cross-Petition because the Court of Appeals decision that Strata's claims fell under the commercial activities exception to the Foreign Sovereign Immunities Act ("FSIA") is unremarkable under the facts of this case. First, Petrobras urges this Court to accept its conditional petition for review due to the perceived conflict in the courts of appeals regarding the proper standard to apply to the "direct effect test" in the third clause of the commercial activities exception in the FSIA. However, the facts of this case show that under any standard for "direct effect" promulgated by any of the courts of appeals, the District Court would have jurisdiction over Strata's breach of contract claims. Accordingly, this case does not squarely present the issue of what the appropriate standard is for the direct effect test, and this Court should deny Petrobras' Cross-Petition.

In Petrobras' second issue, it requests that this Court review the issue of whether "an act" in the second clause of the commercial activities exception must be a commercial act and what minimum level of activity is required to satisfy the second clause. However, the Court of Appeals

held that under the facts of this case the District Court had jurisdiction over Strata's fraud claim under either the second or first clauses of the commercial activities exception. Further, although the Court of Appeals acknowledged prior precedent holding that "an act" under the second clause should be non-commercial, it did not expressly so hold in this case. Therefore, this case does not squarely present this issue, and this Court should deny Petrobras' Cross-Petition.

B. Statement of Facts

This case is about a multi-billion dollar foreign corporation with offices in the United States soliciting business in the United States, making various agreements with small United States oil and gas businesses, making misrepresentations in the United States to those businesses, and breaching those agreements in Brazil which had a substantial and direct effect upon the businesses in the United States.

1. INITIAL CONTACTS BY PETROBRAS

The activities at issue are Petrobras and Strata contracting (1) to joint venture to increase production in marginal oil and gas fields in which Petrobras owned concession rights from Brazil and (2) for Petrobras to sell up to seventeen prospects in Brazil to Strata (*i.e.*, assign Strata the concession rights in the properties which Petrobras owned in Brazil). (R. 227). At a conference in 1996, Petrobras solicited United States businesses to become partners with it in the development of oil and gas fields in Brazil. (R. 220). In March 1997, the Consulate General of Brazil located in California furnished Strata

information concerning oil and gas investment opportunities in Brazil, including an article wherein Petrobras once again solicited United States petroleum and gas services providers to bid on contracts it would be offering. (R. 219).[1]

Due to these solicitations, Strata attempted to contact Petrobras. Luiz Antonio Reis, then general manager for Petrobras America, Inc., which officed in Houston, Texas, originally spoke with Strata's representative over the phone and solicited Strata to invest in Petrobras' partnership opportunities in Brazil.[2] (R. 218). Based upon this solicitation in the United States and a conversation between Strata and Petrobras America (an alter ego of Petrobras) in the United States, Strata decided to enter into negotiations with Petrobras to jointly develop certain oil and gas fields.

2. PARTIES ENTER MOU AND ATA

Strata and Petrobras entered into a Memo of Understanding ("MOU") on June 11, 1997, that governed issues of confidentiality so that Petrobras could disclose various projects available for joint development. (R. 227). After reviewing the proposed projects, Strata selected two projects (BES-1 and BFS-1) to do a technical review, and

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[1] Oddly, on page 4 of Petrobras' Cross-Petition, it states: "Not once did any representative of Petrobras ever come to the United States to deal with Strata." However, as shown herein, this is not true.

[2] Pursuant to Petrobras' own website, Petrobras America, Inc. was acting as agent for Petrobras in terms of soliciting Plaintiffs into considering making investments in partnership with Petrobras in Brazil to rejuvenate existing marginal producing oil and gas properties. (R. 220-216).

after Petrobras confirmed that they were available, the parties entered into an Agreement on Technical Assistance ("ATA") on August 4, 1997. (R. 227, 212-211). The ATA was an agreement whereby Strata, having reviewed the information provided under the MOU, made recommendations with respect to exploration of oil and gas prospects and/or enhancement of marginal fields. (R. 212-211). Under the ATA, Strata released data to Petrobras on specified areas or projects with respect to technical and economic evaluations. (R. 212-211).

3. PARTIES AGREE TO ENTER INTO A HOA

To enter into a joint venture to develop oil and gas properties, the parties were required to negotiate another independent agreement aside from the ATA and MOU. The Heads of Agreement ("HOA") is a separate agreement from the MOU and the ATA and is one of the bases of the underlying suit. (The underlying suit was not based upon either the MOU or the ATA.) After years of negotiation, Petrobras and Strata contracted and agreed to all material terms of the HOA for enhancement of three marginal fields in Brazil – it was a joint development agreement. (R. 227, 223). Petrobras prepared the HOA and it was executed by Strata on July 30, 1999. (R. 223). When Strata signed the HOA, Petrobras represented that it approved the HOA's execution but that its signatory officer was out of the office that day and that the HOA would be signed by Petrobras when he returned. (R. 223).

Later, however, Petrobras informed Strata that Petrobras would not sign the HOA. (R. 223). In lieu of the HOA, Petrobras offered a separate deal to sell up to

seventeen oil and gas properties in Brazil to Strata on a preferred, no-bid basis. (R. 223). On many occasions, Petrobras repeated this offer and assured Strata that such an offer was approved by everyone at Petrobras – including its Board of Directors. (R. 222). Strata accepted Petrobras' offer to contract for the sale of up to seventeen oil and gas properties and commenced conducting due diligence to evaluate the properties. (R. 222). Strata did not seek a "competitive advantage." Petrobras offered Strata one in exchange for extinguishing Strata's rights under the HOA. (R. 222).

4. PETROBRAS MAKES MISREPRESENTATIONS IN USA

Petrobras suggested that Strata attend a conference in September of 1999 in Houston, Texas, where Petrobras Director Jose Coutinho Barbosa ("Coutinho") would be present. (R. 226). It was important to Strata to confirm Coutinho's support because Petrobras told Strata that once Coutinho approved a transaction, that the full Petrobras Board was sure to approve it. (R. 226). In view of the many changes and failures of Petrobras to proceed forward on the HOA and the fact that Strata would release important contractual rights under the HOA in exchange for the exclusive right to purchase the properties, it was imperative that Strata receive direct assurances before proceeding forward and incurring additional costs both in time and expenses. (R. 226). During a morning break in the conference, the Strata representative introduced himself to Coutinho, who recognized Strata and stated that he was familiar with their past and pending transactions with Petrobras. (R. 226-225).

In this conversation, Coutinho affirmed that he had approved the sale of the properties to Strata on a private, exclusive basis. (R. 227, 225). Strata asked Coutinho if the full Petrobras Board would approve the subject sale, to which Coutinho smiled and stated that anything that he approves is always approved by the full Board. (R. 225). Coutinho then reconfirmed that the sale would take place. (R. 225). Coutinho affirmed that the sale was valid under Brazilian law. (R. 76, 227). He stated that Petrobras' legal department concluded that the sale was legal and would hold up in court if challenged by any third party. (R. 227, 225). He added that Petrobras' legal staff was prepared to advise the full Board as to this fact when the matter came up for full Board approval. (R. 225).

5. THE TRUTH COMES OUT

After Strata continued pressing about when the sale was to go through, in March of 2000 Petrobras notified Strata that a private, preferred sale was illegal under Brazilian law and that Petrobras would not agree to a preferred sale of the properties to Strata. (R. 76, 222). Petrobras' representations regarding the transaction's legality were affirmatively false and were made in reckless disregard of their veracity. (R. 224). Petrobras knew or should have known that such a structured private sale was illegal under Brazilian law. (R. 224-223). Petrobras' representations were made with the intention of inducing Strata to forego insisting upon performance of the HOA because the sale was offered in lieu of the HOA. (R. 224-223). In other words, Petrobras refused to execute the HOA in breach of its promises and agreement to do so, and Coutinho's representations in Houston were part of Petrobras' efforts to divert and misguide the Strata entities into

not seeking to enforce their rights under the HOA. (R. 224-225).

6. STRATA IS DAMAGED BY PETROBRAS' ACTIONS

The Strata entities relied on Petrobras' misrepresentations by not demanding enforcement of their rights under the HOA, and by conducting due diligence work both in Texas and California to evaluate the value of the seventeen oil and gas properties and by seeking financing in the United States for such acquisitions. (R. 224-223). The representations and Strata's reliance caused Strata injury and reliance damages. Petrobras' actions caused a direct effect in the United States: 1) Strata's due diligence, efforts and expenditures made in the United States to evaluate the properties being offered by Petrobras in an amount in excess of $200,000; and 2) the value of Strata's labor devoted solely to evaluating the properties and preparing the reports, being approximately 1,368 days of work in the United States, valued at $820,800.00 in addition to secretarial time valued at $40,000.00. These damages were foreseeable by Petrobras as it sought out United States companies to perform work in the United States that would benefit Petrobras.

II. REASONS THE CROSS-PETITION SHOULD BE DENIED

a. The Lower Courts' Opinions Were Correct In Holding that the District Court had Jurisdiction Over Strata's Claims

Strata's claims revolve around Petrobras' fraud in the United States, and its act of breaching the Parties' agreement

to develop and sell oil and gas properties that had a substantial and direct effect on Strata in the United States. The FSIA provides that a foreign government (or government owned business in this case) can be sued in the United States where the suit is based on a commercial activity that has a direct effect in the United States. In *Republic of Argentina v. Weltover, Inc.*, this Court construed what is meant by "commercial activity,"[3] as follows:

> [W]e conclude that when a foreign government acts, not as regulator of a market, but in the manner of a private player within it, the foreign sovereign's actions are "commercial" within the meaning of the FSIA. Moreover, because the Act provides that the commercial character of an act is to be determined by reference to its "nature" rather than its "purpose," 28 U.S.C. § 1603(d), the question is not whether the foreign government is acting with a profit motive or instead with the aim of fulfilling uniquely sovereign objectives. Rather, the issue is whether the particular actions that the foreign state performs (whatever the motive behind them) are the type of actions by which a private party engages in "trade and traffic or commerce."

504 U.S. 607, 112 S.Ct. 2160, 119 L.Ed.2d 394 (1992). There is no dispute that the claims in Strata's complaint involve "commercial activity," not "sovereign activity." (R.

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[3] The FSIA defines "commercial activity" as: "(d) A "commercial activity" means either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose." 28 U.S.C. §1603(d).

476). Petrobras contracted to jointly develop oil and gas properties for the presumed profit of both Petrobras and Strata. (R. 227). Further, Petrobras fraudulently made representations regarding the sale of oil and gas properties. (R. 227-223). Petrobras' actions involved "trade and traffic or commerce." (R. 222). All of the conduct that Strata bases its claims upon is connected to commercial activity. (R. 222). Lastly, there is a jurisdictional nexus between Petrobras' conduct and the United States as Strata's claims fall under the commercial activity exception. (R. 222-218). The Court of Appeals' decision that the District Court had jurisdiction under the FSIA over Strata's fraud and breach of contract claims is unremarkable, fact based, and is correct. Therefore, this Court should deny Petrobras' Cross-Petition.

1. The Correct Standard for the Direct Effect Test of the Third Clause of the Commercial Activities Exception is Not Properly Before This Court as the Facts of This Case Justify A Direct Effect Under Any Standard

Petrobras complains that the Court of Appeals erred in finding that Strata's financial losses in this case were a "direct effect" of Petrobras' commercial activity so that Strata's breach of contract claims did fall under the third clause of the commercial activities exception in the FSIA. The third clause allows a United States court to assert jurisdiction over a foreign state when the cause of action is based "upon an act outside . . . the United States in connection with a commercial activity . . . (that) causes a direct effect in the United States." 28 U.S.C. §1605(a)(2).

In *Republic of Argentina v. Weltover*, this Court reversed several courts of appeals' "substantial and foreseeable" test for the "direct effect" requirement of the third clause. 504 U.S. 607, 611 (1992). This Court found that "an effect is 'direct' if it follows as an [inevitable and] immediate consequence of the defendant's . . . activity." *Id.* at 618. In *Weltover*, several bondholders sued Argentina and its central bank in district court in New York for breach of contract. This Court held that Argentina's unilateral rescheduling of the bond's maturity dates had caused a direct effect in the United States. Because New York was the place of performance of defendants' contractual obligations, the rescheduling of the bonds necessarily had a direct effect in the United States.

Petrobras would like to narrow the "direct effect" requirement as set forth by this Court in *Weltover*. True, the courts of appeals have not been entirely consistent as to the application of this Court's analysis of the third clause. Some courts have held that "mere" financial harm to a United States individual or company is not sufficient under the third clause to be direct effect. For example, in *United World Trade v. Mangyshlakneft Oil Production Association*, the court of appeals held that there was not a direct effect where the place of performance of the contract was entirely in Europe and the place of payment was entirely in Europe. 33 F.3d 1232, 1239 (10th Cir. 1994) (using the "legally significant act" test to determine that a United States company incurring financial injury outside of United States was not sufficient). The court denied the plaintiff's argument that since it planned to transfer the payments from its European bank account to its United States bank account, that there was a direct effect in the United States.

However, under any standard for the third clause, including the "legally significant act" test, Strata's claims in this case provided the District Court with jurisdiction. The facts of this case show that Strata did not suffer "merely" financial harm. First, Petrobras actively sought out United States businesses in the United States – it was a part of Petrobras' business plan to contract with United States businesses. Second, Strata performed much labor and services for Petrobras' benefit in the United States. This is not a case of a United States plaintiff arguing that it had a direct effect solely because its financial statement would see an impact – i.e., financial damages outside of United States. Strata performed substantially all of their services to review and evaluate the properties and to make recommendations on their proposals in the United States – not Brazil. (R. 223-220). The value of Strata's services amount to hundreds of thousands of dollars.[4] Strata performed its intellectual work product (the engineering evaluations, the technical evaluations, the economic evaluations) in the United States. (R. 223-220). The loss of such "time and effort" devoted to the evaluation of the properties and to enter into the joint venture with Petrobras

[4] Strata's efforts and expenditures made in the United States to evaluate the properties being offered by Petrobras is in an amount in excess of $200,000, which included engaging petroleum engineers in the United States to provide reports and opinions on the projects, expenses incurred for financing the projects, trips to meet Petrobras' representatives in Houston at conferences, engaging accountants to provide accounting and financial projections, and travel expenses incurred in the U.S. for travel to Brazil; and the value of Strata's labor devoted solely to evaluating the properties and preparing the reports, being approximately 1,368 days of work in the United States, is valued at $820,800.00 in addition to secretarial time valued at $40,000.00.

formed part of the basis of Strata's damages. (R. 223-220). Likewise, the loss of Strata's time and effort in evaluating the seventeen properties to purchase was primarily incurred in the United States. (R. 227-220). All, or a large part of these costs, went directly to benefit Petrobras, and certainly are recoverable under Strata's equitable common law causes of action, i.e., quantum meruit. (R. 223-220).

Further, Petrobras knew that Strata were United States companies that would be performing most, if not all, of their work in the United States. In other words, it was very foreseeable to Petrobras that Strata would rely upon Petrobras' representations and incur work, labor, expenses, and damages in the United States. Additionally, if Petrobras had lived up to its agreements, payment likely would have been made in the United States – Strata is made up of small United States oil and gas companies with United States bank accounts and a payment by Strata under a prior unrelated agreement with Petrobras was made in the United States.

Under these facts, Strata did not "merely" suffer financial harm, and under any standard for the direct effect test under the third clause, the District Court had jurisdiction over Strata's claims. *See e.g., Hanil Bank v. PT Bank Negara Indon. (Persero),* 148 F.3d 127, 132 (2d Cir. 1998); *Adler v. Federal Republic of Nig.*, 107 F.3d 720, 727 (9th Cir. 1997). Indeed, the Court of Appeals held:

> Strata's complaint sufficiently alleges contract losses, in the form of reliance, expectancy, and restitution damages, that occurred as an immediate consequence of Petrobras' commercial activity in Brazil. In particular, Strata complains that Petrobras represented that it had agreed to abide by the terms of the HOA when it had not, that

> Strata relied on Petrobras' representations and spent considerable sums and suffered opportunity costs as a result of that reliance, and that Strata performed valuable services which benefited Petrobras and for which it has not been justly compensated.
>
> Strata has alleged that Petrobras targeted American corporations as joint venture partners, actively solicited their participation, and then requested that they perform extensive evaluations of Brazilian properties knowing those evaluations would be done with American resources. It was not merely fortuitous that the plaintiffs were American companies; it was part of Petrobras's business plan. Accordingly, we conclude that Petrobras's representations of its intent to enter the HOA and its acceptance of the ATA reports is conduct upon which Strata's claims are based and that some undetermined but nontrivial amount of Strata's losses followed as an immediate consequence of such conduct.

See Joint Appendix at 11a-12a.

Even though there may be some conflict in the courts of appeals regarding the scope of the direct effect test under the third clause, under the facts of this case under any approach the District Court had jurisdiction. Accordingly, this Court should deny Petrobras' Cross-Petition.

2. The "An Act" Requirement Under Second Clause of Commercial Activities Exception is Not Properly Before this Court as the Court of Appeals Did Not Directly Rule Upon It

Under the second clause, Petrobras raises two issues: 1) whether the term "an act" in the second clause of the commercial activities exception must be non-commercial; and 2) what is the minimum level of activity that is required under the second clause. The second clause to the commercial activity exception provides that a foreign government will not have immunity if the plaintiff's cause of action is based upon 1) an act in the United States (2) in connection with commercial activity outside the United States. 28 U.S.C. § 1605(a)(2). As applied to this case, Petrobras performed an act in the United States by misrepresenting in Houston, Texas, that Brazilian law allowed a private sale of Brazilian properties and that such sale was approved, and this misrepresentation was connected with the commercial activity of selling Brazilian oil and gas interests in Brazil. (R. 227-223). This statement was false. A single false statement upon which the other party relies can form the basis of a fraud claim. *Stena Rederi A.B. v. Comision de Contratos*, 923 F.2d 380, 390 (5th Cir. 1991). Further, an act of fraud in the United States is sufficient to be an "act" under the second clause of the commercial activity exception. *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 710 (9th Cir. 1992); *United States Fidelity & Guaranty Company v. Petroleo Brasileiro S.A.-Petrobras*, 1999 U.S. Dist LEXIS 7235 (S.D.N.Y. 1999), *aff'd*, 199 F.3d 94 (2d Cir. 1999).

Petrobras attempts to create an issue by pointing to *prior* Fifth Circuit caselaw that implies that the term "an

act" must be non-commercial. However, that issue was not ruled upon by the Court of Appeals in this case as the Court of Appeals found that Strata's fraud claims fell under either the first or second clause of the commercial activities exception:

> Strata's fraud claims are based upon either a commercial act performed within the United States or upon a noncommercial act performed within the United States in connection with commercial activity abroad. Accordingly, the district court had jurisdiction to consider Strata's fraud claims against Petrobras, regardless of whether that jurisdiction was created by the first or the second clause of the commercial activity exception.

See Joint Appendix 10a. The Court of Appeals did not go through an analysis of whether Strata's claims fell under the second clause and did not expressly hold that it did. Where a court of appeals does not address the issue raised by a petitioner, this Court should deny the petition. In other words, the Court of Appeals in this case did not decide "an important question of federal law that has not been, but should be, settled by this Court" regarding the second clause of the commercial activity exception to the FSIA. *See* SUP. CT. R. 10(c). As the Court of Appeals did not squarely address this issue, Petrobras seeks an impermissible advisory opinion as to the "an act" requirement of the second clause. Accordingly, there is nothing presented for this Court's review and Petrobras' Cross-Petition should not be granted on this issue. *See United States v. Rimer*, 220 U.S. 547, 55 L.Ed. 578, 31 S.Ct. 596 (1911) (Court did not grant petition where court of appeals did not deal with issue asserted in petition).

Further, Petrobras does not raise in a question presented whether the Court of Appeals erred in holding that the District Court would have jurisdiction over Strata's fraud claim if it was commercial due to the first clause of the commercial activities exception.[5] Where Petrobras complains about the Court of Appeals' either/or ruling, it should have complained about both alternatives. As Petrobras fails to do so in its question presented, it has waived any complaint as to the Court of Appeals' decision that the District Court has jurisdiction over Strata's fraud claims.

Additionally, the very nature of Petrobras' argument regarding the second clause is nonsensical. It complains

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[5] Petrobras did mention this fact in its Cross-Petition at page 19-20, but failed to include the first clause in a question presented for this Court's review. Further, Petrobras mentions the "substantial contact" requirement for the first clause, but fails to describe how an act of fraud committed in the United States upon which a United States company relies to its substantial detriment is not a "substantial contact." Accordingly, Petrobras has waived this issue by failing to include it in a question presented and by failing to properly brief it. *See e.g., Sunderland v. United States*, 266 U.S. 226, 69 L.Ed. 259, 45 S.Ct. 64 (1924) (where assignment of errors contained no suggestion that erroneous admission of evidence would be relied upon, rulings would not be reviewed). Even if this issue were not waived, the Court of Appeals did not err in finding that the first clause would apply to Petrobras' fraudulent conduct. As one commentator has stated: "The second clause is satisfied whenever any type of act occurs in the United States and is in connection with commercial activity abroad. The issue is not likely to become prominent, however, because if an American act is significant enough to support jurisdiction under the second clause, it most probably will qualify as a commercial activity in the United States under the first clause as well." Joseph W. Dellapenna, *25th Anniversary of the Foreign Sovereign Immunities Act: Refining the Foreign Sovereign Immunities Act*, 9 WILLAMETTE J. UNT'L L. & DISPUTE RES. 57, 125-26 (2001).

about the Court of Appeals' *prior* decisions regarding the term "an act" in the second clause – that the term is more appropriately applied to non-commercial acts. On pages 20 and 21, Petrobras implies that these prior opinions are incorrect and that the term "an act" should apply to all acts. As noted by Petrobras, this is the same argument that Strata made in their Appellants' Brief. If Petrobras is correct, Strata is correct, and the Court of Appeals' *prior* opinions were incorrect, then the Court of Appeals' decision in this case is correct. Certainly, there will be a better case in the future for this Court to review regarding the "an act" requirement under the second clause.

Further, Petrobras has not shown any other courts of appeals' decisions on this issue that would require this Court to settle a conflict among the courts of appeals. This Court should allow other courts of appeals to review this issue and author opinions before this Court decides to review it. It is commonly said that a court of last resort should allow an issue to percolate in the lower courts before taking up the issue. Other courts of appeals may have opinions and insights that may be of use and benefit to this Court. Accordingly, this issue is not ripe at this time.

Lastly, Petrobras requests that this Court review the "minimum level of activity" that is required under the second clause to the commercial activities exception. Once again, the Court of Appeals may not have determined this case under the second clause, and Petrobras seeks an advisory opinion from this Court on that issue. Even so, the District Court did not err in finding that Petrobras' intentional fraudulent conduct committed in the United States against United States companies that substantially and directly affected the companies in the United States

was sufficient to meet the "minimum level of activity" required under the second clause.[6] There will be more appropriate cases in the future dealing with the "minimum level of activity" required to satisfy the second clause. Accordingly, this honorable Court should not grant Petrobras' Cross-Petition.

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[6] A single false statement upon which the other party relies can form the basis of a fraud claim. *Stena Rederi A.B. v. Comision de Contratos*, 923 F.2d 380, 390 (5th Cir. 1991). Further, an act of fraud in the United States is sufficient to be an "act" under the second clause of the commercial activity exception. *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 710 (9th Cir. 1992); *United States Fidelity & Guaranty Company v. Petroleo Brasileiro S.A.-Petrobras*, 1999 U.S. Dist LEXIS 7235 (S.D.N.Y. 1999), *aff'd*, 199 F.3d 94 (2d Cir. 1999).

III. CONCLUSION

Strata requests that this honorable Court deny the Conditional Cross-Petition for a Writ of Certiorari, and should solely grant Strata's Petition for Review under Cause No. 03-313.

Respectfully submitted,

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